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In The

Supreme Court of the United States

CLARK COUNTY, NEVADA,

Petitioner,

v.

VACATION VILLAGE, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF ON BEHALF OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.; THE AIRCRAFT OWNERS AND PILOTS ASSOCIATION; AIRPORTS COUNCIL INTERNATIONAL-NORTH AMERICA; AND THE REGIONAL AIRLINE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae consist of five associations, each of which represents a different, critical component of the nation's air transportation industry: commercial airline pilots, passenger and cargo air carriers, private aircraft owners and pilots, local governments that own and operate nearly all the nation's commercial airports, and regional airlines.

These constituencies are well known to have conflicting views on many issues that affect the air transportation industry, but they are in unusual and complete agreement on the importance of the legal issue presented by this case. The Ninth Circuit's errant legal analysis threatens the public's right to safe and secure transit through our nation's navigable airspace. If left unreviewed, the ruling below will have a significant adverse impact on the *amici* and their members, whose daily operations are central to the nation's economy and to the travel needs of tens of millions of Americans.

The Air Line Pilots Association, International (ALPA) is a labor union that represents 61,000 professional airline pilots at 40 air carriers in the United States and Canada. ALPA's members operate at all air carrier airports in the United States, including McCarran International Airport in Las Vegas, which is at issue in this case. ALPA's motto is "schedule with safety," and ALPA is recognized in the airline industry for its contributions to flight safety.

The Air Transport Association of America, Inc. (ATA) is the principal trade and service organization of the major scheduled air carriers in the United States. ATA's members annually serve approximately 600 million passengers and transport millions of tons of air cargo in the National

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[1] Letters from all parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made any such monetary contribution.

Aviation System, including most of the visitors and cargo entering McCarran International Airport.

The Aircraft Owners and Pilots Association (AOPA) is a nationwide membership association of more than 400,000 individual pilots and aircraft owners. AOPA members fly and own most of the civil aircraft fleet of the United States, ranging from light sport aircraft to large turbojet aircraft. This segment of aviation is commonly known as "general aviation." In terms of hours flown, general aviation accounts for more than half of civil flying in the National Aviation System. General aviation utilizes McCarran International Airport and all other civilian airports in the country.

Airports Council International-North America (ACI-NA) is a trade association representing the state, regional, and local government bodies that own and operate the principal airports served by scheduled air carriers in the United States and Canada, including petitioner Clark County, Nevada, which owns and operates McCarran International Airport. The 135 ACI-NA member airports in the United States handle approximately 95 percent of the air passenger traffic in the United States.

The Regional Airline Association (RAA) represents short-haul scheduled airlines that provide service primarily between small and medium-sized communities and the nation's hub airports. RAA's 43 member airlines serve 99 percent of the airports in the United States with scheduled commercial service, including McCarran International Airport, and transport 97 percent of the passengers carried by regional airlines.

SUMMARY OF ARGUMENT

Local zoning ordinances that regulate land near airports are part of a federal system that guarantees the right of safe and efficient public air transit. Yet, according to the Ninth Circuit, the comprehensive, cooperative safety scheme enacted by Congress and implemented by the Federal Aviation Administration (FAA) does not prevent a State from imposing massive *per se* takings liability on local governments that enact height-restriction

zoning ordinances as part of this scheme, even when such restrictions do not constitute a taking under federal law.

The Ninth Circuit erred because state law that imposes such liability is preempted by federal aviation statutes and regulations. State standards for the taking of navigable airspace that expand the universe of compensable claims beyond that recognized under federal law frustrate, and effectively nullify, the carefully crafted scheme of cooperative federalism that ensures the capacity, safety, and development of our National Aviation System. Absent a decision from this Court confining the limits of state awards for the taking of navigable airspace, individual States can trump the federal interest in ensuring safe and efficient public transit through that airspace.

A. This is the second multimillion-dollar state takings judgment upheld against petitioner based on the Nevada Supreme Court's determination that any local regulation of the first 500 feet of airspace above privately-owned land is a *per se* taking under state law. These massive monetary judgments will surely spawn a flood of additional suits against local authorities in Nevada and elsewhere.

This case provides an ideal vehicle for the Court's determination of the preemption question because the Ninth Circuit assessed the takings claim under both federal and state law and found a compensable taking under the latter but not the former. Nevada's unqualified *per se* takings standard (upon which the Ninth Circuit's decision was based) substantially diverges from federal law in a manner that clearly highlights the Supremacy Clause problem. Moreover, the Ninth Circuit's categorical preemption analysis relies on a mistaken reading of this Court's decision in *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965).

B. Congress has expressly determined that the federal government has exclusive sovereignty over the nation's navigable airspace, 49 U.S.C. § 40103(a)(1), and that the public has a right to safe and efficient transit through that airspace, *id.* § 40103(a)(2). It has also recognized that cooperation between itself, the FAA, and

local zoning authorities is essential to the operation of our complex modern aviation system because local governments typically own and operate public-use airports. Congress specifically envisions and encourages the enactment of local zoning ordinances to eliminate aircraft safety hazards. *See id.* § 47107(a)(10).

Nevada's *per se* airspace takings law targets such local zoning ordinances and thereby frustrates congressional purposes. The local height restrictions at issue here, which are an essential part of the federal airspace management scheme, do not require payment of compensation to subjacent landowners under the federal Constitution. In reaching a distinctly different conclusion under its own law, Nevada burdens local governments that are acting in accordance with the objectives of Congress, thereby undercutting the cooperative system set forth in federal statutes and regulations. This frustration of federal purposes is particularly acute because Nevada's law makes compensation a *per se* entitlement whenever height-restriction zoning ordinances limit use of the first 500 feet of airspace in order to facilitate the safe takeoff and landing of aircraft.

Automatic, multimillion-dollar state law takings judgments threaten the National Aviation System in myriad ways. Every segment of the aviation industry (large and small, public and private) would experience crippling uncertainty as a result of a local government's potential liability. Such liability puts local governments in the untenable position of choosing between allowing hazardous construction or paying millions of dollars to individual landholders, each to the detriment of the flying public. The decreased investment that results from potential liability of this magnitude affects airport infrastructure, airline routes, and safety enhancements, even in areas of the country not directly affected by a State's takings law. Ultimately, as the system addresses the costs and risks of windfall awards that bear no relationship to landowners' reasonable investment-backed expectations, our Nation could experience an erosion of the

policies that have provided us with the safest and most efficient air transportation system in the world.

ARGUMENT

REVIEW IS WARRANTED HERE BECAUSE THE CONTINUED SAFE OPERATION OF OUR NATIONAL AVIATION SYSTEM REQUIRES PREEMPTION OF STATE LAW TAKINGS CLAIMS, LIKE RESPONDENTS', THAT FRUSTRATE THE COOPERATIVE EFFORT OF FEDERAL AND LOCAL GOVERNMENTS TO PREVENT HAZARDOUS OBSTRUCTIONS NEAR AIRPORTS

In July 2006, the Supreme Court of Nevada ruled that a local height-restriction zoning ordinance of petitioner Clark County, Nevada, that was designed to facilitate the safe takeoff and landing of aircraft at McCarran International Airport, constituted a *per se* regulatory taking as a matter of state constitutional law because the ordinance placed some limits on the use of certain airspace below 500 feet above ground level (AGL). *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110, 1125-1127 (Nev. 2006), *cert. denied*, 127 S. Ct. 1260 (2007). The state court's ruling in *Sisolak* upheld a $6.5 million takings judgment in favor of an owner of land near the airport, even though the owner had *not* been prevented from making substantial and beneficial use of his property (indeed, consistent with the height restrictions, a 600-room resort hotel and casino was authorized to be built on the land, albeit at a slightly lower height than first requested).

The ruling in the instant case further exacerbates the situation. Here, the United States Court of Appeals for the Ninth Circuit affirmed a second multimillion-dollar damage judgment against Clark County for another nearby landowner based on the same *per se* state takings claim. The Ninth Circuit did so by misreading this Court's precedent, and despite its express conclusion that there was no compensable taking under federal law. *Amici* here, who also filed a brief in support of the petition for a writ of *certiorari* in the *Sisolak* case, renew their request that this Court review this matter of extreme importance to the future functioning of our National Aviation System.

A. This Case Is Indicative Of A Gathering Storm That Threatens The Future Of Our National Aviation System, And It Presents This Court With An Ideal Opportunity To Avoid That Result

1. This second multimillion-dollar judgment against petitioner will undoubtedly lead to many other such lawsuits

Owners of property near Nevada airports are now entitled to automatic compensation under state law for the taking of the airspace above their land when local zoning ordinances impose height restrictions, even though the restrictions are reasonable and necessary to prevent hazardous obstructions that could interfere with the safe takeoff and landing of aircraft. By requiring payment even to those property owners who retain the ability to make economically beneficial use of their land consistent with the zoning limitations, Nevada's *per se* takings claim deviates sharply from the nuanced three-factor federal takings analysis articulated by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).[2] Thus, as the Ninth Circuit recognized, the landowners who were awarded millions in the state law takings actions in *Sisolak* and in the instant case would not have been entitled to any compensation under federal law.

This new standard has a potentially staggering effect on local governments that are responsible for the protection of airport safety. In Nevada alone there are 51 public airports with even more individual runways. Many of the local governments in Nevada's 17 counties have enacted zoning ordinances to regulate the height of structures near these airports. *See, e.g.*, Washoe County, Nev. Development Code § 110.402.10(e) (1998) (height restrictions applicable to certain land surrounding

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[2] *Penn Central* requires, *inter alia*, consideration of the zoning regulation's economic impact on the landowners, particularly the extent to which the regulation interferes with their investment-backed expectations, and the character of the regulation. *Ibid.*

Reno/Tahoe International Airport); Carson City, Nev. Code § 16.02.030 (2007) (Carson Airport). Each local government that has enacted height-restriction zoning ordinances in cooperation with the FAA is now threatened with the prospect of multimillion-dollar takings judgments in favor of the landowners near the airports.

There are likely to be many such landowners. In Las Vegas alone, "there are 3,554 acres within a 20,000-foot radius of [McCarran] airport boundaries that have zoning similar to that of the land on which damages were awarded" in *Sisolak*. Richard N. Velotta, *Airport Land Use: Lawsuits Could Prompt Cuts At Las Vegas Airport*, THE LAS VEGAS SUN, May 28, 2003. The hefty size of the awards in *Sisolak* ($6.5 million in compensatory damages) and in the instant case ($10 million in total) will most certainly generate additional claims against petitioner and many other Nevada localities.

The impact of Nevada's state takings ruling may ultimately extend well beyond its borders because Nevada is not the only State that has interpreted its own constitutional takings clause to provide greater rights for property owners than the federal Constitution.[3] Prompted by Congress and the FAA, local governments around the country have enacted zoning ordinances that restrict the height of structures near airports.[4] The holding below serves up a compelling financial incentive for a flood of follow-on demands by landowners who, without having to demonstrate diminution of their property's value, will claim a taking of "their" airspace near every airport where

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[3] *See, e.g., City of Norwood v. Horney*, 853 N.E.2d 1115, 1136, 1141-1142 (Ohio 2006); *Board of County Comm'rs v. Lowery*, 136 P.3d 639, 651 (Okla. 2006); *Manufactured Hous. Communities of Washington v. State*, 13 P.3d 183, 187-190 (Wash. 2000).

[4] *See, e.g.*, Adams County, Colo. Development Standards & Regulations § 3-29-05-02-09 (2007); Miami-Dade County, Fla. Code § 33-335 (2007); Broward County, Fla. Code § 39-359.2 (2007); Phoenix, Ariz. Code § 4-240 (2007); San Diego, Cal. Code §§ 132.0201-132.0209 (2006); Jacksonville, Fla. Code § 656.10051 (1999); Loudoun County, Va. Zoning Ordinance § 4-1404(B)(3), (D) (1998).

zoning height restrictions have been adopted. It is not at all surprising that such airspace takings actions have already begun to appear in other States. *See, e.g.*, *Dutta v. County of El Dorado*, No. PC 20070464 (Calif. Super. Ct., El Dorado County) (complaint filed Jul. 31, 2007).

2. The instant case is an ideal vehicle for this Court's resolution of the preemption issue

This particular case provides an ideal vehicle for the Court's review of the question of whether federal aviation statutes and regulations ever preempt state law takings claims involving the nation's navigable airspace.

First, the Ninth Circuit assessed respondents' claim under both federal and state takings law and concluded that there was no compensable taking under the federal Constitution. Pet. App. 18a.[5] Because the Ninth Circuit ruled that an award of compensation was permissible only under state law, this Court's review of the case would be able to focus on the discrete question whether a State's takings law that exceeds federal takings standards is preempted because it frustrates the purposes of the congressionally crafted airspace management regime.

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[5] The Ninth Circuit's holding on the federal takings claim is not subject to dispute. There is no *per se* taking under federal law because there was not a permanent physical invasion of respondents' property, nor were respondents deprived of all economically beneficial uses of the property. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (describing limited circumstances when a *per se* taking exists under federal Constitution); *see also United States v. Causby*, 328 U.S. 256, 266 (1946) (holding that "[f]lights over private land are not a taking" unless they are "so low and so frequent" that they render the subject property uninhabitable or destroy existing businesses on the property); *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84, 88 (1962) (same). Furthermore, as the Ninth Circuit properly recognized, petitioner's zoning restrictions do not qualify as a compensable federal taking of respondents' property under the three-factor analysis of *Penn Central*. *See Lingle*, 544 U.S. at 540 ("the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests").

Moreover, a case presenting a clear conflict between state law and the federal scheme for regulating navigable airspace (*i.e.*, where there is a holding that the local zoning ordinance effects a taking under state but not federal law) is not easily replicable. State and federal takings claims are rarely adjudicated in the same proceeding.[6] But as a result of bankruptcy jurisdiction, the state and federal takings claims here were considered in a single forum, with diverging outcomes.

3. The Ninth Circuit's misreading of this Court's opinion in *Jankovich* to establish a categorical non-preemption rule requires this Court's intervention

The Ninth Circuit relied on this Court's decision in *Jankovich*, 379 U.S. at 487, to reject the preemption argument in this case. The lower court viewed *Jankovich* as presenting a "substantially similar issue" and a holding that had not been called into question. Pet. App. 19a-20a. The Ninth Circuit's language indicates that it read *Jankovich* to preclude categorically any assertion that federal law preempts state airspace takings claims.

But *Jankovich* does not control the preemption question in this case. The state test for assessment of a taking in *Jankovich* did not appear to exceed the standards used for federal takings law at that time,[7] and

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[6] This may be because federal law normally requires plaintiffs to pursue compensation through mechanisms provided under state and local law before pursuing federal claims. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

[7] *Compare Indiana Toll Road Comm'n v. Jankovich*, 193 N.E.2d 237, 240 (Ind. 1963) ("[T]he *reasonable and ordinary* use of air space above land is a property right which cannot be taken without the payment of compensation." (emphasis added)), *cert. granted*, 377 U.S. 942 (1964), *with Griggs*, 369 U.S. at 88-89 (recognizing that use of land presupposes ordinary use of some airspace for structures on the land), *and Causby*, 328 U.S. at 264 (similar). Indeed, the Indiana court relied in part on *Griggs* and *Causby* in applying its state standard. *See Jankovich*, 193 N.E.2d at 240.

the application of the particular zoning regulation at issue in *Jankovich* likely constituted a taking under federal law.[8]

Moreover, it is not at all clear that *Jankovich* even addressed what is now commonly described as "frustration-of-purpose" conflict preemption. This Court granted *certiorari* in *Jankovich* "[b]ecause it appeared that the case involved the [constitutionality] of airport zoning regulations." 379 U.S. at 489. The Court dismissed the writ of *certiorari* as improvidently granted, however, because it turned out that the Indiana standard (like the federal standard) applied only to "ordinarily usable air space" and thus did "not porten[d] the wholesale invalidation of all airport zoning laws." *Id.* at 493. Not surprisingly, in that limited context (*i.e.*, where the State's takings law appeared to be commensurate with federal takings law), this Court concluded that the preemption assertion was "insubstantial." *Id.* at 492 n.2, 494.

In contrast with the takings standard in *Jankovich*, Nevada's airspace takings law plainly and sharply deviates from federal takings standards under *Penn Central* by declaring that any height restriction on the first 500 feet of airspace effects a taking *per se*. *Jankovich* simply did not speak to the question that Nevada's *per se* standard clearly presents here: whether a State's airspace takings law is preempted where it exceeds federal takings standards. In any event, for the myriad frustration-of-purpose reasons discussed *infra*, if *Jankovich* is properly read as controlling in this context, *amici* urge the Court to take this opportunity to overrule that decision.

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[8] The regulation imposed a height limitation of 18.5 feet, although the toll road had been constructed at a height of 25 feet. *Jankovich*, 193 N.E.2d at 238. The toll-road operator contended that such a drastic restriction robbed the land of its reasonable, economically beneficial use and thus effected a federal taking. *See* Br. of Resp. at 36-53, *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487 (1965) (No. 60).

B. Federal Law Preempts State Law Claims That Interfere With The Cooperative Regulatory System That Congress Has Authorized And The FAA Enforces In Conjunction With Local Governments

1. Our complex National Aviation System functions safely and efficiently because it is based on cooperative federalism

As Justice Jackson observed more than 60 years ago, "[p]lanes do not wander about in the sky like vagrant clouds." *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring). In other words, aircraft travel within a highly regulated, closely monitored, and intricately complex system. *See City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638-640 (1973). Today more than ever, the network of air transportation in this country is vast, complicated, and interconnected. Federal law fully recognizes that the efficient and safe operation of the National Aviation System requires cooperation between federal regulators and the local governments that often own and operate the nation's airports. Federal law also envisions that these entities will work together to implement programs that advance federal aviation objectives.

a. To understand why cooperation between local governments, the FAA, and Congress is critical to the provision of safe and efficient public air transit, one need only consider the scope and scale of the modern National Aviation System. There are more than 5,000 public-use, and over 9,000 private-use, airports in the United States. *See* FAA Airport Facilities Data Report worksheet.[9]

Approximately eighty percent of the public-use airports, including all of the larg ommercial airports, are owned or operated by local governments. *Ibid.* Collectively,

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[9] Data compiled after performing parameter search at http://www.faa.gov/airports_airtraffic/airports/airport_ safety/airportdata_5010/.

these airports operate nearly 18,000 runways, *ibid.*, and handled more than 61 million takeoffs and landings last year alone, *see* Federal Aviation Administration, *FAA Aerospace Forecasts: Fiscal Years 2007-2020*, at 21 (2007).[10]

Our commercial aviation system carried an estimated 740 million passengers in 2006. *Id.* at 64. And the FAA projects that by 2015, the National Aviation System will accommodate nearly 74 million takeoffs and landings yearly, *id.* at 90, with the total flying public soaring to more than one billion annually, *id.* at 64.

b. Congress has made clear that "the safe operation" of our complex airport and airway system is our nation's "highest aviation priority." 49 U.S.C. § 47101(a)(1); *see also id.* § 40103(a)(2) (recognizing that safe public travel by air furthers both the national interest and the public welfare of local communities served). Congress has charged the FAA with responsibility to "maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public." *Id.* § 40101(a)(3). Moreover, Congress has expressly called for programs that encourage airport proprietors (such as local governments) to improve capacity, safety, and efficiency, *id.* § 47101(a)(7), thus "promoting, encouraging and developing civil aeronautics and a viable, privately-owned United States air transport industry." *Id.* § 40101(a)(14).

Federal law recognizes that federal control over airspace management is a critical component of achieving the goal of safe and efficient public air transit. Congress has declared unequivocally that "[t]he United States Government has *exclusive* sovereignty of airspace of the United States." *Id.* § 40103(a)(1) (emphasis added); *see also Northwest Airlines*, 322 U.S. at 303 (Jackson, J., concurring) ("The air is too precious as an open highway to permit it to be 'owned' to the exclusion or embarrassment of air navigation by surface landlords who could put it to

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[10] *Available at* http://www.faa.gov/data_statistics/aviation/aerospace_forecasts/2007-2020/media/FORECAST%20BOOK%20SM.pdf (last visited Nov. 15, 2007).

little real use."). Congress has given the FAA broad authority over the navigable airspace, including authority to "develop plans and policy for the use of the navigable airspace" and to regulate the use of the airspace as necessary to ensure its safe and efficient use. 49 U.S.C. § 40103(b)(1); *see also* 49 U.S.C. § 40102(a)(32) (defining "navigable airspace" to mean "airspace above the minimum altitudes of flight prescribed by [FAA] regulations * * * including airspace needed to ensure safety in the takeoff and landing of aircraft").[11]

c. Because it is the local governments, not the federal government, that own and operate civilian airports, regulatory cooperation between the federal and local governments is of paramount importance to the prevention of aviation safety hazards. The federal government provides local governments with significant federal funding to build, maintain, and expand local airport facilities through grants from the Aviation Trust Fund. Before a local government may receive a grant through this program, however, Congress requires the FAA to receive certification from the grant recipient that "appropriate action, *including the adoption of zoning laws*, has been or will be taken to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations." *Id.* § 47107(a)(10) (emphasis added).

To facilitate the adoption of uniform and consistent zoning regulations with respect to property near airports, the FAA has even issued a "Model Zoning Ordinance," which recognizes that "[a]viation safety requires a minimum

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[11] According to FAA regulations, the prescribed minimum flying altitude in uncontested areas is 500 feet AGL, "[e]xcept when necessary for takeoff or landing." 14 C.F.R. § 91.119. Consequently, before the Nevada Supreme Court rendered its unqualified state airspace takings ruling, all of the actors involved in the air transportation industry shared a common legal view that even the airspace *below* 500 feet AGL was open to the flying public if necessary for the safe takeoff and landing of aircraft, and could be regulated to prevent future uses that would create a hazard to air navigation.

clear space (or buffer) between operating aircraft and other objects." Federal Aviation Administration, Advisory Circular 150/5190-4A, *A Model Zoning Ordinance to Limit Height of Objects Around Airports*, at 1, § 3(a) (Dec. 14, 1987).[12] The zoning regulations at issue in this case draw from the model ordinance and likewise address the safety need for a buffer zone between aircraft and ground objects.

The FAA has also developed procedures that work in conjunction with local ordinances to provide a context-specific, case-by-case inquiry into whether a particular nonaviation usage of airspace can be accommodated without a decrease in the safety of, and the capacity for, aircraft takeoffs and landings. *See generally* 14 C.F.R. Pt. 77.[13] If the agency determines that proposed

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[12] *Available at* http://www.faa.gov/airports_airtraffic/airports/resources/advisory_circulars/media/150-5190-4A/150_5190_4A.pdf (last visited Nov. 15, 2007).

[13] Pursuant to these procedures, the FAA requires that it be notified when anyone proposes to build or alter specified structures near an airport. *Id.* § 77.13. The FAA then conducts aeronautical studies to determine whether the proposed structure would constitute an actual hazard to aviation, including an analysis of whether the proposed structure exceeds "imaginary surface" standards (artificial engineering boundaries drawn in the air around airports). *Id.* §§ 77.31, 77.33, 77.35; *see also* Federal Aviation Administration Order 7400.2E, Procedures for Handling Airspace Matters § 6-3-7, *available at* http://www.faa.gov/airports_airtraffic/air_traffic/publications/at_orders/media/AIR.pdf (last visited Nov. 15, 2007); 14 C.F.R. § 77.25. The most obvious hazard concern is, of course, that airplanes might collide with structures during takeoff and landing. In addition, the existence of tall structures can create visual hazards, such as lighting or glare, that make it difficult for pilots to see the landing approach and interfere with an airplane's navigational equipment or an air traffic controller's radar. Consequently, the FAA works with local authorities to evaluate the land surrounding airports and to analyze proposed ground obstacles based on a variety of parameters.

The FAA will find that development is a hazard only if the aeronautical study results in a finding that its adverse impact on the safe and efficient use of the airspace, facilities, or equipment is substantial. In most instances, the FAA thereafter "negotiate[s] with the proponent [of the construction] during the study process to resolve any adverse effect(s) on aeronautical operations." Federal Aviation

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construction may pose a safety concern and no accommodation can be reached, local land-use authorities look to that hazard determination to ascertain the extent of use that is consistent with public safety and welfare. Thus, the zoning ordinances not only further the federal government's general safety objectives but also implement its particular interest in protecting the traveling public while seeking to accommodate beneficial land use.

2. Nevada's *per se* airspace takings rule is preempted because it interferes with the statutory right of public transit through navigable airspace and the regulatory safety objectives necessary to ensure that right

Congress's purposes in enacting comprehensive aviation statutes that establish a cooperative airspace management and safety system are frustrated in several respects by airspace takings claims that exceed federal takings standards. Although a State's constitution generally may provide broader protection than the Federal Takings Clause, such state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

Federal preemption is clear in this case. First, Nevada's *per se* airspace takings rule is based upon the mistaken view that every landowner has a property right to erect a structure of up to 500 feet in height, even if doing so presents an aircraft hazard. But Congress has given the federal government exclusive sovereignty over navigable airspace, including airspace "needed to ensure safety in the takeoff and landing of aircraft," and it has

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Administration, Advisory Circular AC 70/7460-2K, *Proposed Construction or Alteration of Objects that May Affect the Navigable Airspace*, at 6 (March 1, 2000). Many times, a minor alteration will satisfy the FAA's concerns about potential hazards. *See ibid.*

granted the public a right to access such airspace. 49 U.S.C. §§ 40102(a)(32), 40103(a)(2). Nevada's declaration that all airspace beneath 500 feet AGL is unqualifiedly private property diminishes the substantial federal interest in, and Congress's express protection of, the public's right to access the navigable airspace, including the airspace above privately held land. *See id.* § 40103(a)(2), (b)(1).

Second, Congress clearly envisioned that air-transit safety and efficiency would be accomplished through the *cooperative* efforts of federal and local authorities. *See, e.g., id.* § 47107(a)(10). Yet, as detailed in Part B.3, *infra*, a state law airspace takings standard that provides for compensation where there is no taking under federal law has chilling detrimental effects that undermine the incentives of local airport proprietors and zoning authorities to cooperate with the FAA.

Third, Nevada's insistence that either private landowners' nonaviation use of all airspace below 500 feet AGL be accommodated or the landowners be compensated contrasts starkly with Congress's express determination that nonaviation usage of the navigable airspace be accommodated only if it does not "decrease the safety and capacity of the airspace and airport system." *Id.* § 47101(a)(8). Where, as here, the property owner suffers no federal taking and the safety and capacity of the airport system would be compromised without a reasonable height restriction, the State's insistence on compensating private landowners plainly frustrates this congressional mandate.

This Court's ruling in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), further confirms that federal law preempts Nevada's *per se* airspace takings claim. In *Boyle*, this Court determined that federal law preempts state civil actions that impose liability upon a government contractor for his performance of duties that promote "uniquely federal interests" at the behest of the federal government. *Id.* at 504-506, 511-512. That important principle is fully applicable here.

3. If the ruling below is not reviewed, there will be dramatic, adverse effects on the safe and efficient use of the nation's navigable airspace

Congress's comprehensive and cooperative regulatory scheme to ensure safe and efficient air transit—*i.e.*, the federal aviation statutes, FAA rulemakings and oversight, federal grants to airports for compatible land use planning and noise abatement, and enforcement of local zoning ordinances—has provided the certainty, stability, and growth that underlies our air transportation network and, in turn, drives our national economic engine. *Amici* and their members are greatly concerned about the many adverse consequences of the Ninth Circuit's failure to recognize that federal law preempts the flawed Nevada Supreme Court airspace takings ruling.

a. Development that poses safety concerns will also affect airport operations and capacity. Airport operators in States that follow Nevada's reasoning necessarily will engage in a different calculus when faced with a hazard determination from the FAA if the ruling below stands. In essence, such local governments will be faced with an impossible dilemma: either forego adoption and enforcement of reasonable zoning restrictions (and potentially the federal grant money that results from zoning assurances) or make costly purchases of the airspace necessary to ensure public access to the National Aviation System.

This Hobson's choice may dramatically affect airport capacity. Local governments that lack sufficient resources to pay landowners may be forced to abandon such ordinances, allowing unconstrained construction near the airports. New structures on surrounding land may present particular safety issues because aircraft will be required to climb more rapidly on departure to avoid the new hazards. The only way to achieve safe clearance of such structures may be to lower aircraft takeoff weight by either reducing the number of passengers and cargo, or by restricting the amount of fuel the aircraft carries, thereby reducing the aircraft's range of flight.

b. Future airport expansion and investment will be limited. If the Ninth Circuit is not reversed, local governments that operate airports in States where compensation is automatically required for height restrictions below 500 feet AGL will be limited in their ability to build or expand runways or airports. *See* Velotta, *Airport Land Use*, *supra*. Where airport operators are uncertain about the risk of liability, they are likely to delay or cancel needed improvements and capacity enhancements. At a minimum, national commerce and the domestic traveling public will be saddled with increased costs that must be passed on by airports subject to *per se* takings liability—as petitioner demonstrates, *billions* of dollars will be added to many airports' operating costs—and those increased costs would likely be for decreased service.

Airlines, too, will have to reassess investment in routes and in larger aircraft. In this age of aviation deregulation, where air carriers make decisions about aircraft usage based on revenue potential, concern about increased landing fees and charges related to the purchase of airspace rights will affect airlines' decisions whether to provide new or additional services.

c. The balance of power between landowners and government entities during hazard negotiations will shift. The prospect of a multimillion-dollar windfall will strengthen each landowner's position in FAA hazard and local zoning negotiations, which, in turn, will affect the rational and negotiated development of the land surrounding airports. McCarran International Airport, for example, is typical of many airports where local authorities built the terminal and runways far away from substantial development, but private development followed the airport and grew up around it.[14] If potential

[14] Thus, neighboring landowners had no reasonable basis for challenging the height restrictions necessary for safe operation of the airport. Indeed, such landowners benefited economically *precisely because* of the property's proximity to such a transit hub. *See, e.g., Adams v. County of Dade*, 335 So. 2d 594, 596 (Fla. Dist. Ct. App. 1976)

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hotel and resort owners can threaten to file lucrative takings actions against the local government for enacting the regulatory height restrictions necessary to ensure the safety of arriving and departing customers, there will be little incentive for such owners to negotiate with the FAA and local zoning boards regarding the nature and characteristics of future development. *See generally* Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527 (2000) (when balance between property owners' rights and local governments' police power becomes tilted strongly in favor of the property owners, the larger community suffers).

d. Smaller airports and rural communities will be especially vulnerable. The majority of Nevada's public airports are in rural locations, away from large cities such as Las Vegas and Reno. These modest, but effective, public airport facilities are critical to remote communities because they enable aircraft service for emergency needs (like medical transportation) and economic resources (like tourism). For the most part, however, these airports were never designed to ensure that small aircraft (*e.g.*, Cessnas, Pipers, and Beechcraft) would be able to reach 500 feet in altitude before leaving the airport's boundaries and flying over adjacent lands. Nevada's *per se* takings law, as affirmed by the Ninth Circuit below, would render reasonable height regulations around such smaller airports untenable as well. Thus, without having to satisfy a *Penn Central* takings test, a rancher in rural Nevada may have the same claim to compensation for the regulation of the airspace above his land as the owner of a hotel near McCarran airport in Las Vegas.

e. There will be a ripple effect on nationwide air carrier services. Any airplane passenger whose coast-to-coast

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(in inverse condemnation suit against airport, evidence demonstrated that "not only [was] there * * * no diminution of the value of the property, but, in fact, an increase in the value").

travel has ever been disrupted midway due to inclement weather knows full well the interdependent nature of our National Aviation System. The federal system that guarantees the safe, efficient network that is now a linchpin of the public welfare relies upon many contributors. And expansive, automatic state law airspace takings judgments dramatically change the legal landscape for all of the *amici*. When one major airport must significantly reduce capacity due to fear of *per se* takings liability, airport operators in neighboring States will face an increased regional demand that they may not be able to meet. Indeed, the mere prospect of massive fiscal liability would discourage thousands of relevant state, regional, and local entities from fulfillment of their role in this interrelated system, making a systemic breakdown in the provision of safe and efficient national air transit a realistic possibility.

CONCLUSION

For the reasons set forth above, and to ensure the safe, secure and economical use of our National Aviation System, this Court should grant the petition for a writ of *certiorari* and reverse the judgment below.

Respectfully submitted,

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